Supreme Court, U.S.
FILED

94 626 OCT - 5 1994

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

October Term 1994

Leon C. Baker, Petitioner

v.

J.R. Bennett and Laura Bennett, Respondents

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Arthur R. Miller
Attorney for Petitioner
1545 Massachusetts Ave.
Cambridge, Massachusetts 02138
Tel.: (617) 495-4111

Date: October 5, 1994

TABLE OF CONTENTS
OF APPENDIX

ORDER OF FLORIDA SUPREME COURT DECLINING JURISDICTION.....A-1

DECISION OF THE FLORIDA FOURTH DISTRICT COURT OF APPEAL.....A-3

BAKER'S MOTION FOR REHEARING.....A-9

BAKER'S MEMORANDUM IN SUPPORT OF MOTION FOR REHEARING.....A-14

ORDER OF FLORIDA FOURTH DISTRICT COURT OF APPEAL DENYING REHEARING.....A-27

BAKER'S AFFIDAVIT IN OPPOSITION TO THE BENNETTS' MOTION FOR SUMMARY JUDGMENT.....A-28

OPINION OF THE ALABAMA SUPREME COURT.....A-45

ORDER OF ALABAMA SUPPREME COURT DENYING REHEARING.....A-66

FLORIDA UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT.....A-67

Supreme Court of Florida

THURSDAY, JULY 7, 1994

LEON C. BAKER,	*	
	*	
Petitioner,	*	CASE NO. 83,671
	*	
v.	*	DISTRICT COURT
	*	OF APPEAL, 4TH
J. R. BENNETT, ET AL.,	*	DISTRICT NO.
	*	92-3150
	*	92-3494
Respondents.	*	
	*	
	*	
	*	

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

GRIMES, C. J., SHAW, KOGAN and HARDING, JJ., AND MCDONALD, Senior Justice, concur

Respondent's Motion for Attorney's Fees is hereby denied.

SHAW, KOGAN and WELLS, JJ., and MCDONALD, Senior Justice, concur

GRIMES, C. J., OVERTON and HARDING, JJ., dissent

A True Copy BH

TEST:

cc: Hon. Marilyn N. Beuttenmuller, Clerk
Hon. Dorothy Wilken, Clerk
Hon. Stephen A. Rapp, Judge
Hon. Thomas E. Sholts, Judge

Sid J. White
Clerk, Supreme Court

Mr. Kenneth W. Lipman
Mr. John T. Malhall, III

[SEAL]

By: Betsy Hull
Deputy Clerk

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

JANUARY TERM 1994

LEON C. BAKER, Appellant, v. J. R. BENNETT, and LAURA BENNETT, Appellees.	)	CASE NO. 92-3150 and 92-3495 L. T. CASE NO. CL 92-995 AG.
J. R. BENNETT and LAURA BENNETT, Appellants, v. LEON C. BAKER, Appellee.	)	CASE NO. 92-3205. L.T. CASE NO. CL 92-995 AG.

Opinion filed March 2, 1994

Consolidated appeals from the Circuit Court for Palm Beach County; Stephen A. Rapp and Thomas E. Sholts, Judges.

Kenneth W. Lipman of Siegal and Lipman, Boca Raton, for Leon C. Baker.

Arthur R. Miller, Pro Hac Vice, Cambridge, Massachusetts, for Leon C. Baker.

John T. Mulhall, III, of Rutherford, Minerley & Mulhall, P.A., Boca Raton, for J.R. Bennett and Laura Bennett.

OWEN, WILLIAM C., Senior Judge,

These consolidated appeals arise out of proceedings to domesticate a foreign judgment pursuant to the Florida Enforcement of Foreign Judgments Act, sections 35.501-55.509, Florida Statues (1991). We find no error and affirm the judgment and orders appealed.

J. R. Bennett and Laura Bennett (the "Bennetts") obtained an Alabama final money judgment against Leon C. Baker ("Baker"). The Bennetts filed and recorded a certified copy of the judgment with the Clerk of the Circuit Court of Palm Beach County as authorized by section 55.503, Florida Statutes. Baker moved to vacate the Alabama judgment on the ground that the Alabama trial court never obtained personal jurisdiction over him, and he also timely filed an independent action challenging the validity of the Alabama judgment on the identical ground.

While these matters were pending before the court below, the Supreme Court of Alabama rendered its decision in Baker v. Bennett, 603 So. 2d 928 (Ala. 1992), expressly upholding the Alabama trial court's conclusion that it had in personam jurisdiction over Baker. The court below, taking judicial notice of the records in the Alabama case, entered a final summary judgment[1] in favor of the Bennetts and, consistent herewith, denied Baker's separate notice to vacate the Alabama judgment.

Dispositive of Baker's appeals is this court's holding in the case of Baron v. Baron, 454 So. 2d 86 (Fla. 4th DCA 1984), wherein the court stated:

> Where a defendant makes a special appearance to challenge the jurisdiction of a court, and the court overrules the objection and determines that it does have jurisdiction, that decision . . . precludes collateral attack on the judgment, even though the ruling may have been erroneous on the facts or law. See 5 Am. Jur. 2d Appearance (1962). An aggrieved defendant must seek reversal in an

[1]Though the trial court's summary judgment does not so recite, it is evident that the trial court concluded that the issue of Alabama's in personam jurisdiction over Baker had been put to rest by the decision of the Alabama Supreme Court.

> appellate court of the state involved or, if he is unsuccessful there, in the Supreme Court of the United States. However, he cannot later attack the judgment on jurisdictional grounds if he does not avail himself of those remedies, or if the judgment is affirmed, or if the appellate court or the Supreme Court of the United States declines to consider the case. See Baldwin v. Iowa State Traveling Men's Association, 283 U. S. 522, 51 S. Ct. 517, 75 L. Ed. 1244 (1931); see also Sherrer v. Scherrer, 334 U.S. 343, 68 S. Ct. 1087, 92 L. Ed. 1429 (1948); Chicago Life Ins. Co. v. Cherry, 244 U.S. 25, 37 S. Ct. 492, 61 L. Ed. 966 (1917).

See also Dusesoi v. Dusesoi, 498 So. 2d 1348 (Fla. 2nd DCA 1986); Tipton v. Van Schouwen, 526 So. 2d 138 (Fla. 2d DCA 1988).

Baker argues that (a) the decision of the Alabama Supreme Court on the matter of Alabama's personal jurisdiction over him did not affect claim preclusion ("res judicata") but affected only issue preclusion ("collateral estoppel"), (b) the Full Faith and Credit Clause does not require issue preclusion ("collateral estoppel") to apply when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate that issue in the

earlier case,[2] and (c) Baker did not have a full and fair opportunity to litigate in Alabama the issue of that state's personal jurisdiction over him because the Alabama Supreme Court sua sponte decided that issue on a theory entirely different from the theory presented in the trial court and argued on the appeal, and then, when Baker sought reconsideration, denied him the opportunity to be heard on the theory adopted by the court.

That Baker had full and fair opportunity to litigate the issue of Alabama's in personam jurisdiction over him cannot be denied - he, indeed, argued the issue extensively in both the trial and appellate courts of Alabama. We find unpersuasive his argument that the lack of opportunity to challenge the reasoning of the Alabama Supreme Court in reaching its decision equates to lack of opportunity to litigate the issue of jurisdiction.[3] The fact that the decision of that court may have been based on a legal theory neither briefed nor argued does not render the decision any less binding

---

[2]Allen v. McCurry, 449 U.S. 90, 101 S. Ct. 411, 66 L Ed. 2d 308 (1980).

[3]It is elementary that an appellate court is concerned with the correctness of the trial court's action and will affirm that action if there is any theory of law which will support it, whether argued or not.

under principles of issue preclusion than would be the case had the decision been erroneous on the facts or law, or been rendered without any written opinion whatever.

Whether the trial court of Alabama had personal jurisdiction over Baker was an issue squarely presented to the Alabama Supreme Court and that court has decided the issue correctly or not, adverse to Baker's contention. A foreign judgment is entitled to full faith and credit in Florida, even as to a question of the rendering court's jurisdiction, when that question has been expressly litigated and decided by the rendering court.[4]

The Bennetts' appeal is from an order quashing levy on certain property alleged to have been subject to writ of execution issued on the judgment. We find no error in that order and therefore affirm it.

AFFIRMED.

POLEN and KLEIN, JJ. concur.

---

[4] Durfee v. Duke, 375 U. S. 106, 84 S. Ct. 342, 11 L. Ed. 2d 186 (1963). Haas v. Haas, 59 So., 2d 640 (Fla. 1952).

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1994

LEON C. BAKER

Appellant, Case No. 92-3150
92-3494

v.

J.R. BENNETT and LAURA BENNETT, L.T. CASE NO CL 92-995 AG

Appellees.

_____/

J.R. BENNETT and LAURA BENNETT,

Appellants, CASE NO. 92-3205

v. L.T. CASE NO. CL 92-995 AG

LEON C. BAKER,

Appellee.

_____/

MOTION FOR REHEARING

Appellant, Leon C. Baker ("Baker"), by his undersigned attorney, moves for a rehearing with respect to the Court's decision filed March 2, 1994. The grounds for

the motion are set forth below and in the accompanying brief in support of the motion.

It is ironic that the Court's decision in this case exemplifies how a sua sponte decision of an appellate court can deny an appellant a full hearing if reconsideration is refused.

The Court found "unpersuasive" Baker's argument that the lack of opportunity to challenge the reasoning of the Alabama Supreme Court on jurisdiction denied Baker a full and fair hearing on that issue. The Court cited no authority but reasoned in footnote 3 of its opinion:

> It is elementary that an appellate court is concerned with the correctness of the trial court's action and will affirm that action if there is any theory of law which will support it, whether argued or not.

The Court formulated this rationale sua sponte. The appellee did not make any such argument either in the Circuit Court or in this Court. Baker, therefore, did not brief or argue the point.

While the footnote is a correct statement of law as far as it goes, it falls far short of leading to the Court's conclusion. The issue in this case is not whether an

appellate court can decide a case on a ground different from that on which the trial court based its decision and different from any ground proposed by the parties. There is no question that the court can. The question is whether having done so, the court should afford the losing party an opportunity to show that the court erred.

What is unfair is to reach a decision on a basis which surprises counsel, and which was, therefore, not briefed or argued, and then to deny counsel an opportunity to show that the court com-mitted error. That is Baker's complaint with respect to the sua sponte decision of the Alabama Supreme Court and also his reason for seeking rehearing here.

If the Court denies Baker an opportunity to demonstrate this by calling relevant authorities in the accompanying brief to the attention of the Court, can it truly be said that he has had a full and fair hearing on issue preclusion?

At the oral argument one member of the panel suggested that if an appellate court sua sponte rests its decision on a ground which counsel did not brief or argue, the fault lies with counsel for the losing party, who failed to

anticipate that the point might arise. That may be true when the ground for a sua sponte decision is valid, or reasonably can be anticipated but not when it is both unprecedented and erroneous. No lawyer can be astute enough to anticipate all the erroneous theories which might be asserted against his client.

The Alabama Supreme Court held that the Alabama Circuit Court had jurisdiction over Baker on a legal theory which cannot be reconciled with any decision of the United States Supreme Court. Baker could not reasonably be expected to have anticipated that the Alabama Supreme Court would, on its own initiative, adopt a theory so out of line with settled constitutional principles enunciated by the United States Supreme Court. When the Alabama Supreme Court denied Baker any opportunity to show that the Court had erred, it denied him a full and fair hearing.

The Florida Enforcement of Foreign Judgments Act, F.S. 501.50 et seq. provides that before a foreign judgment can be enforced, the judgment debtor has thirty days in which to bring an action to challenge the validity of the judgment. The Florida legislature clearly did not wish foreign judgments to be conclusive against Florida residents

without regard to the circumstances under which they were obtained. Full faith and credit does not require that a judgment be given issue preclusion effect on a matter as to which there has not been a full and fair hearing. This Court should, as contemplated by the Florida Enforcement of Foreign Judgments Act, protect Baker, a Florida resident, from being bound on a constitutional law issue with regard to which he was denied a full and fair hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by United States mail upon RUTHERFORD, MINERLY & MULHALL, P.A., P. O. Box 81005, Boca Raton, FL 33481-0005, this 15th day of March 1994.

Respectfully submitted,

Siegel and Lipman

By Kenneth W. Lipman

Kenneth W. Lipman
Attorneys for Appellant
Suite 801-Crocker Plaza
5355 Town Center Road
Boca Raton, FL 33486

Of Counsel
Arthur R. Miller
1545 Massachusetts Ave.
Cambridge, Mass. 02138
Tel.: (617) 495-4111

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT JANUARY TERM 1994

LEON C. BAKER

Appellant,

Case No. 92-3150
92-3494

v.

J.R. BENNETT and LAURA BENNETT,

LT CASE NO CL 92-995AG

Appellees.

_____/

J.R. BENNETT and LAURA BENNETT,

Appellants,

CASE NO. 92-3205

v.

L.T. CASE NO. CL 92-995 AG

LEON C. BAKER,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, PALM BEACH COUNTY

APPELLANT'S BRIEF IN SUPPORT OF MOTION FOR REHEARING

Of Counsel:

Arthur R. Miller
1545 Massachusetts Avenue
Cambridge, Massachusetts 02138

Kenneth W. Lipman
Florida Bar No. 267546
SIEGEL AND LIPMAN
Attorneys for Appellant
5355 Town Center Road
Boca Raton, FL 33486

SUMMARY OF ARGUMENT

Appellant, Leon C. Baker ("Baker") seeks a rehearing on the ground that the Court's decision failed to address the determinative issue in this case: What constitutes a full and fair hearing?

That question is critical because appellees (the "Bennetts") invoked issue preclusion to prevent this Court from considering whether the Alabama court which rendered a judgment against Baker had the necessary personal jurisdiction over him. The Bennetts argued that this matter had been litigated in Alabama and, therefore, could not be reexamined in this Court. However, with regard to issue preclusion it is not sufficient that the issue have been litigated. There must have been a full and fair hearing.

It is clear that, as a matter of fact, Baker did not have a full and fair hearing. The essence of a full and fair hearing is that a party is permitted to support his position on every issue in dispute. After the Alabama Supreme

Court sua sponte advanced a novel - and by any standard completely erroneous - theory for holding that Alabama had personal jurisdiction over Baker, the Court refused him an opportunity to show that the theory is constitutionally deficient because it is contrary to decisions of the United States Supreme Court. From a lay point of view at least, Baker did not have a full and fair hearing on the Alabama Supreme Court's sua sponte theory.

Nevertheless, this Court held that the Alabama Supreme Court did not deny Baker a full and fair hearing, as a matter of law, because an appellate court may affirm a decision on a legal theory different from any the parties argued. An appellate court undoubtedly has such a right, but the conclusion the Court drew from it is a non sequitur. It is true that when an appellate court decides an appeal on a theory which the parties did not brief and argue, that is not in itself a denial of a full and fair hearing. The denial occurs only if the court refuses the losing party any opportunity to show that the court's opinion is erroneous.

Courts have recognized that an essential element of a fair hearing is a right of rebuttal. For example, redirect

examination is limited to the matters covered in cross examination because, in the absence of recross, there will be no chance of rebuttal. In the same vein, a reply brief may not raise new issues, which the appellee will have no opportunity to rebut. Similarly when a court decides a case on a new theory not briefed or argued by either party, for the hearing to be full and fair, the court must afford the losing party an opportunity to show that the court has erred. This is particularly imperative when, as in this case, the decision may be unconstitutional.

POINT I

WHEN A COURT DECIDES A CASE SUA SPONTE ON A THEORY NOT BRIEFED OR ARGUED BY THE PARTIES AND THEN DENIES REHEARING, THERE HAS NOT BEEN A FULL AND FAIR HEARING.

Appellate courts rarely decide cases sua sponte on a legal theory which the parties did not brief or argue. Under our adversary system, lawyers are highly motivated to ferret out all the legal issues in the lower court. It is important that they do so because of the general rule that an appellate

court will not consider any issue which was not presented to the court below. See, e.g., Lou Bachrodt Chevrolet, Inc. v. Savage, 570 So.2d 306 (Fla. 4th DCA 1990), rev. den., 581 So.2d 165 (1991); Kozich v. Hartford Insurance Co. of Midwest, 609 So.2d 1471, 148 (Fla. 4th DCA 1992).

There are exceptions to that rule, of course, most notable being that an appellate court may affirm a correct decision of the lower court on a proper theory even though the lower court reached the result by erroneous reasoning. The fact that there is such an exception, however, does not foreclose a question as to whether the losing party has had a full and fair hearing when the losing party had no opportunity to show that the the theory which the court considered "proper" might be erroneous, let alone unconstitutional.

The issue in this case, the Court should note, is not whether, when an appellate court, reaches a decision sua sponte, it is duty bound to grant rehearing to the losing party, and the Court need not decide that question. The only issue here is whether such a sua sponte decision on which rehearing is denied should be given issue preclusion effect.

The classic statement of what constitutes due process in a hearing was articulated by Justice Brandeis, speaking for a unanimous Supreme Court, in American Surety Co. v. Baldwin, 287 U.S. 156, 53 S.Ct. 98, 77 L.Ed. 231 (1932) at 287 U.S. 168:

> Due Process requires that there be an opportunity to present every available defense....

The Supreme Court made clear in that case that if a judgment is entered without a prior hearing meeting the requirements of due process, then due process requires that such a hearing must be granted after entry of judgment.

The Florida Supreme Court said in Ryan's Furniture Exchange v. McNair, 120 Fla.109, 162 So.483 (1935) at 162 So.487:

> In observing due process of law, the opportunity to be heard must be full and fair, not merely colorable or illusory.

In Robinson v. Malik, 135 So.2d 445 (Fla.3d DCA 1961), the plaintiff sued for partition and the defendant filed a counterclaim to quiet title and for damages. After the plaintiff had put on his case and before the defendant completed the presentation of her case, the Court declared

it was ready to rule and permitted no further evidence by the defendant or rebuttal by the plaintiff. In holding that the plaintiff was deprived of due process of law, the 3d District Court of Appeal said at 135 So.2d 445:

> It is apparent from this record that the final decree goes beyond the issues framed in the pleadings and beyond the proof adduced. Therefore, it is a clear departure from the requirements of due process of law, particularly when the plaintiff was not permitted to have his day in court in defense of the cross-claim.

In Atkins v. State, 136 Fla. 596, 187 So. 363 (1939), the Circuit Court of Calhoun County gave the respondent eight hours to respond to a writ of mandamus. The respondent sought several addi-tional days to prepare a proper response. The court extended the respondent's time for only an additional 26 hours. At the end of the 26 hours the respondent requested five additional days "to have a reasonable opportunity for such a hearing." The Court denied the request "for the reason that the Court is familiar with the law involved in the case and finds that further hearing and argument is unnecessary." In reversing, the Supreme Court said at 187 So.365:

> The haste with which the case was disposed of amounted to a denial of due process of law because respondent was not allowed a sufficient time to adequately prepare his defense.

As in Robinson v. Malik and in Atkins v. State, supra, the Alabama Supreme Court proceeded on the basis that it "knew" the constitutional requirements for long arm jurisdiction without any input on the Court's sua sponte theory from Baker's counsel. The cases cited above make clear that Baker did not receive a full and fair hearing in the Alabama Supreme Court on the issue of juris-diction. That tribunal's unilateral and constitutionally erroneous conclusion - as to which it denied Baker any opportunity to point out the error - cannot be a basis for issue preclusion.

POINT II

THE QUESTION IN THIS CASE IS ONE OF ISSUE PRECLUSION. THE COURT ERRED IN RELYING ON CASES INVOLVING CLAIM PRECLUSION.

Claim preclusion applies whether or not there were issues which could have been litigated but were not. The

situation is entirely different when the question is issue preclusion. There can be no issue preclusion unless the precise issue was fully and fairly litigated.

Baron v. Baron, 454 So.2d 86 (Fla. 4th DCA 1984), which the Court cited as "dispositive" of Baker's appeals, was not an issue preclusion case but a claim preclusion case. The husband in that case sued in Florida for dissolution of the marriage after the wife had sought the identical relief in a New Hampshire divorce action. The husband claimed he had never been served in New Hampshire, but the New Hampshire court ruled against him and granted the wife a divorce. The husband did not appeal. Divorce was the relief claimed in both New Hampshire and Florida. The decree in New Hampshire granting a divorce precluded another suit on the claim for divorce in Florida.

Moreover, the husband in Baron did not contend, as Baker does here, that he did not receive a full and fair hearing in the earlier action.

Accordingly Baron is not a precedent for this case for two reasons: (1) It involved claim preclusion, not issue preclusion. (2) No question was raised with respect to the fullness or fairness of the determination that there was jurisdiction of the husband in the New Hampshire action.

Dusesoi v. Dusesoi, 498 So.2d 1348 (Fla.2d DCA 1986), cited by the Court, is inapplicable for the same reasons. In that case, as in Baron, both spouses sought a divorce, the wife in Florida and the husband in Texas. It again was a case of claim preclusion, not issue preclusion. Furthermore, as in Baron, there was no contention that the hearing on jurisdiction in Texas was not full and fair.

Durfee v. Duke, 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.

2d 186 (1963), was also a claim preclusion case and again there was no issue as to the fairness of the hearing in the earlier case.

Tipton v. Van Schouwen, 526 So.2d 138 (Fla. 2d DCA) 1988, in contrast to Baron, Dusesoi and Durfee, was an issue preclusion case. There was no claim, however, that the defendant had been denied a full and fair hearing in Texas. On the contrary, the defendant had requested a hearing on jurisdiction in the Texas court but then failed to appear at the hearing. It was the defendant's own fault that he did not receive a full hearing on jurisdiction in Texas. The case is clearly not a precedent here.

Haas v. Haas, 59 So.2d 640 (Fla. 1959), involved issue preclusion but there was no contention that the respondent had been denied a full and fair hearing. As in Tipton, the Court had granted the respondent a hearing, but he did not take advantage of the opportunity to present his case.

The criteria for the application of claim preclusion are less stringent than those for applying issue preclusion. Claim preclusion puts an end to litigation on a particular

claim. Issue preclusion is applied when there will be further litigation in any event on a different claim. Refusal to apply issue preclusion does not reopen a closed case. It opens only a single issue on which there has not been a full and fair hearing. The Restatement (Second) of Judgments declares in comment j to Section 28:

> But whether or not relief from the first judgment may be obtained, the court in the second proceeding may conclude that issue preclusion should not apply because the party sought to be bound did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the first proceeding.... [C]onfined within proper limits, discretion to deny preclusive effect to a determination under the circumstances stated is central to the fair administration of preclusion doctrine.

CONCLUSION

This Court should grant rehearing on the question of whether Baker received a full and fair hearing on the issue of jurisiction in the Alabama Supreme Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by United States mail upon RUTHERFORD, MINERLY & MULHALL, P.A., P. O. Box 81005, Boca Raton, FL 33481-0005, this 15th day of March 1994.

Respectfully submitted,

Siegel and Lipman

By _____

Kenneth W. Lipman
Attorneys for Appellant
Suite 801 - Crocker Plaza
5355 Town Center Road
Boca Raton, FL 33486
(407) 368-7700

Of Counsel

Arthur R. Miller
1545 Massachusetts Ave.
Cambridge, Mass. 02138
Tel.: (617) 495-4111

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT, P. O. BOX 3315, WEST PALM BEACH, FL 33402

LEON C. BAKER

Appellant(s),

vs.

J. R. BENNETT and LAURA BENNETT

Appellee(s).

CASE NO. 92-03150
92-03205 92-03494

L. T. CASE NO CL 92-995 AG
PALM BEACH

April 8, 1994

BY ORDER OF THE COURT:

ORDERED, that Appellant's motion filed March 15, 1994, for rehearing is hereby denied.

I hereby certify the foregoing in a true copy of the original court order.

MARILYN BEUTTENMULLER
CLERK

cc: Kenneth W. Lipman
Dorothy H. Wilken, Clerk
John T. Mulhall, III

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR
PALM BEACH COUNTY, FLORIDA

CONSOLIDATED CASE NO.: CL-92-995 AG

_____X

LEON C. BAKER,

Plaintiff,

-against-

J.R. BENNETT AND
LAURA BENNETT,

Defendants.
_____X

AFFIDAVIT IN OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

BEFORE ME, the undersigned authority, personally appeared Leon C. Baker, who after being by me duly sworn deposes and says of his personal knowledge that:

1. I am the plaintiff in this action and the facts set forth in this affidavit are based upon my personal

knowledge except where otherwise indicated.

A. The Issue Here is Issue Preclusion Not Claim Preclusion.

2. As set forth in detail below and in the accompanying memorandum of law, the motion of the defendants ("the Bennetts") for summary judgment must be denied for one or the other of two alternative reasons. (a) If the Bennetts admit the facts alleged in this affidavit, the motion must be denied as a matter of law, because res judicata is inapplicable and the Alabama court which rendered the judgment against me did not have jurisdiction. (b) If the Bennetts deny the facts set forth in this affidavit, then the motion must be denied because it raises material issues of fact as to what the Alabama Supreme Court actually decided.

3. In either event, it is essential that the Court keep in mind that the type of res judicata which the Bennetts are invoking in this case is issue preclusion (sometimes called "collateral estoppel") rather than claim preclusion (sometimes called "bar" or "res judicata" in a narrow sense). The accompanying memorandum of law shows that the difference is vital, because issue preclusion

applies only to matters which have been fully and fairly litigated. As I show below, the matters which the Bennetts claim are res judicata were not fully and fairly litigated. Accordingly there can be no issue preclusion as to those matters. They remain open to re-examination by this Court, and upon re-examination, it is clear that the Alabama courts did not have jurisdiction to render a judgment against me.

4. Issue preclusion is the relevant principle in this case rather than claim preclusion, because the cause of action I am suing on is different from the causes of action on which the Bennetts sued me in Alabama. I am proceeding here under the Florida Enforcement of Foreign Judgments Act, F.S. §55.509, to contest the jurisdiction of the court which rendered the Alabama judgment that the Bennetts have filed with the Clerk of this Court. The Bennetts sued me in Alabama on three counts. The first was for legal malpractice. The other two counts were for intentional fraud.[1] The other two counts were for

[1]The Alabama trial court granted my motion for a directed verdict dismissing the professional malpractice count.

intentional fraud.[2]

Because the Bennetts sued on different causes of action from the one I am suing on in this case, only issue preclusion is involved here.

B. Neither the Preliminary Proceedings in Alabama Nor the Alabama Supreme Court Are Res Judicata.

5. The Bennetts cite as conclusive that the Alabama trial court had jurisdiction over me two preliminary determinations (one by the Alabama trial court and the other by the Alabama Supreme Court denying a writ of mandamus) and a determination on appeal by the Alabama Supreme Court. The accompanying memorandum of law shows that none of those proceedings has any issue

[2]The Bennetts failed to prove their claims for intentional fraud. The Alabama Supreme Court held, nevertheless, that even in the absence of any evidence of intentional fraud, I could be held liable for innocent misrepresentation or innocent nondisclosure. (See the opinion of the Alabama Supreme Court attached to defendants' motion as Exhibit F, pages 12 through 14.) Alabama's application of its own law to hold me liable for conduct in New York for which New York would not impose liability raises another due process issue, which was not fully and fairly litigated in Alabama. See paragraphs 24 - 26 below and Point III of the accompanying Memorandum of Law.

preclusion o other res judicata effect.

6. The decision of the alabama trial court that it had jurisdiction is no res judicata for three reasons: (a) It was tentative only; the Bennetts still had the burden of proving at the trial that the Alabama Circuit Court had jurisdiction.[3] (b) The decision of the Alabama Circuit Court was interlocutory and not appealable. (c) The decision of the Alabama Circuit Court was made on the basis of conflicting affidavits not after an evidentiary hearing. As the accompanying memorandum of law shows, the preliminary determination would be given no res judicata effect in Alabama and can be given no greater effect in this Court.

7. The denial by the Alabama Supreme Court of my application for a writ of mandamus has no res judicata effect because the issuance of such a writ is discretionary. The Alabama Supreme Court gave no reason for the denial,

[3]The Bennetts offered no evidence on jurisdiction at the Alabama trial. They sought to remedy this on the appeal to the Alabama Supreme Court by citing the materials they had presented on the preliminary motion, but the Supreme Court properly did not to any extent rest its decision on what had been submitted on the preliminary motion.

and there is no evidence that the Alabama Supreme Court considered the jurisdiction issue on the merits.

C. Issues the Alabama Supreme Court Left Undecided.

8. The Bennetts' third ground for claiming res judicata, the decision of the Alabama Supreme Court, similarly has no preclusion effect but for different reasons. My appeal to the Alabama Supreme Court on the issue of the trial court's personal jurisdiction over me presented two questions of constitutional law, one under the 14th Amendment and one under the Commerce Clause of the United State Constitution. The Alabama Supreme Court did not decide either of them.

9. Instead the Court held that the trial court had jurisdiction over me on a ground that had not been asserted in the trial court. Consequently it had not been briefed or argued by the parties on the appeal to the Alabama Supreme Court.

10. The opinion of the Alabama Supreme Court also raised for the first time, but did not decide, an issue

under the Full Faith and Credit Clause of the United States Constitution. It did so by applying Alabama law to events which occurred, if at all, in New York.

11. Since the Alabama Supreme Court raised these two issues for the time on the appeal without giving the parties an opportunity to present relevant legal authorities, these issues were not fully and fairly litigated and the decision of the Alabama Supreme Court can have no issue preclusion effect.

12. I made an application for rehearing to the Alabama Supreme Court, in which I sought a hearing on the two new issues raised by the Court's decision. My application was denied. Accordingly for a second time I was denied a hearing on those questions.

D. The Two Submitted Issues The Alabama Supreme Court Did Not Decide.

13. This lawsuit arose out of a purchase in June 1981 by defendant j.R. Bennett ("Bennett") of an interest in computer located in England from Donald Gibbs, an American resident, who is not a party to this action (or to the disputes between the parties). Defendant Laura Bennett

is the wife of J.R. Bennett and filed joint federal income tax returns with him.

14. Six months earlier the seller, Gibbs, and an associate, Johnny West, purchased the computers from two of my clients, Atlantic Computer Leasing, p.l.c. ("Atlantic"), an English computer leasing company, and its Netherlands affiliate. At the time I was practicing law in New York, and I was the lawyer for these two European companies in the sale to Gibbs and West.

15. When Gibbs resold half of his interest to Bennett, my relation to the resale consisted of the following:

(a) In response to a telephone call initiated by Bennett's accountants in Alabama to my law office in New York, I ascertained that my clients, would consent to the sale of part of Gibbs' interest to J.R. Bennett.

(b) In a second long distance telephone call initiated in Alabama by Bennett's Alabama accountants to my New York law office, I approved, on behalf of my clients, the proposed from of assignment from Gibbs to Bennett.

(c) A copy of the executed assignment from Gibbs to Bennett was received by me in New York, and I then transmitted it to my clients in England and the Netherlands.

I represented neither party to the transaction between Bennett and Gibbs, and I sought no compensation in connection with any of the above and I received none.

16. Bennett claims that there was a third long distance telephone call from his accountants in Alabama to me in New York, during which Bennett was handed the telephone and had a 30 second conversation with me. According to Bennett, I said that the purchase from Gibbs would give the Bennetts "a good tax shelter."

17. Bennett in his pretrial deposition gave an entirely different version of this conversation. He said it occurred several months **after** his purchase from Gibbs and that he and I were discussing a different proposed computer transaction, for Bennett's corporation and not for Bennett himself. I deny that there was any prepurchase conversation between Bennett and me, but solely for purposes of the

appeal to the Alabama Supreme Court, I conceded that it occurred.[4]

18. These facts raised two constitutional law issues which were addressed in my briefs to the Alabama Supreme Court but the Court did not decide them. The first of these is whether three unsolicited telephone calls from Alabama to me in New York could be the basis for long arm jurisdiction over me. The accompanying memorandum of law shows that Alabama's assertion of personal jurisdiction over me based on these telephone calls violated the Due Process provision of the Fourteenth Amendment of the United States Constitution.

19. It is unclear from the decision of the Alabama Supreme Court whether the Court disagreed with my

[4]The Bennetts did not allege any prepurchase conversation in their Alabama complaint and they did not cite it as a contact with Alabama in opposing my motion to dismiss on the ground that the Alabama court lacked personal jurisdiction over me. Bennett id not testify in his pre-trial deposition that there was any such conversation; nor did the Bennetts claim there was any prepurchase conversation in papers they filed opposing my motion for summary judgment. The accountant who placed the call to me did not testify that there was any such conversation. The first mention of this alleged prepurchase conversation was by Bennett at the trial.

argument or whether it agreed that the telephone calls were insufficient to give the trial court jurisdiction. In any event, the Court did not mention the telephone calls in its opinion and held that the trial court had jurisdiction on an entirely different theory (discussed in paragraphs 20 and 21 below).

20. An alternative and completely independent issue raised by Alabama's assertion of jurisdiction over me based on the three unsolicited telephone calls from Alabama to me in New York arose under the Commerce Clause of the United States Constitution. The issue is whether a state's exercise of jurisdiction on the basis of interstate transmission of information is an impermissible burden on interstate commerce. The accompanying memorandum of law shows that there are United States Supreme Court precedents which require a holding that the Commerce Clause has been violated. The memorandum shows also that a valid Commerce Clause objection would make the Alabama judgment void and subject to collateral attack even if there were no violation of due process. The Alabama courts, however, did not rule on this matter, and it remains open for decision here.

E. The Two Constitutional Issues On Which The Alabama Court Denied Me A Hearing Which Were, Therefore, Not Litigated.

21. Having passed over the Due Process and Commerce Clause issues raised by the assertion of jurisdiction on the basis of the three unsolicited interstate telephone calls, the Alabama Supreme Court held that the trial court had jurisdiction on a theory which the parties had not raised in the trial court or briefed on the appeal. The Court held that representation of my European clients in connection with the earlier Gibbs and West purchase was sufficient to give the Alabama trial court jurisdiction over me on claims arising out of Gibbs' resale of half his interest to Bennett. The Alabama Supreme Court did not specify whether it was holding that the trial court had general jurisdiction or specific (long arm) jurisdiction. The accompanying memorandum of law shows that the requirements of neither were met. Since the effect of my participation in the Gibbs and West transaction had not been briefed on the appeal I sought a rehearing, but it was denied.

22. If the Alabama Supreme Court had granted me a hearing, I would have been bound by its decision even though the Court clearly erred. The Alabama Supreme Court, however, reached its decision on this point without any input from the parties and it then denied my application for rehearing, so there was no hearing at all on the matter. Consequently, there can be no issue preclusion.

23. The holding on jurisdiction was not the only matter the Alabama Supreme Court decided with no input from the parties, thereby denying me a hearing. Although the Alabama case was tried on an intentional fraud theory, the Alabama Supreme Court affirmed on an entirely different theory. It recognized that there was no evidence of any intentional misrepresentation or intentional omission to disclose relevant facts, but the Court held nevertheless that the jury could have found me liable for innocent misrepresentation or innocent nondisclosure.

24. Since the Bennetts had been asserting only intentional misrepresentation and intentional suppression, there had been no dispute at the trial over the applicable law. The laws of Alabama, New York, Florida, and England do not differ with respect to liability for intentional fraud.

25. But once the Alabama Supreme Court sua sponte changed the Bennetts' claim by holding me liable for innocent misrepresentation or nondisclosure, rather than for intentional misrepresentation or nondisclosure, the governing law became critical. Alabama law differs from that of the other jurisdictions in allowing for recovery of damages for innocent misrepresentation and innocent non-disclosure. Accordingly, once the Alabama Supreme Court shifted the focus away from intentional fraud to innocent misrepresentation or innocent nondisclosure, it was necessary to consider what law was applicable.

26. My innocent misrepresentation and innocent nondisclosure, if they occurred at all, took place in New York. The "Center of gravity" of the transaction was England, where the equipment was purchased, financed, leased and located. The computers remained in England and there was never any intent to transport them to Alabama.

27. The Alabama Supreme Court declined to consider any law other than its own. As the accompanying memorandum of law shows, that was a violation of the Due

Process Clause of the Fourteenth Amendment as well as a violation of the Full Faith and Credit Clause of Article IV, Section 1 of the United States Constitution.

F. The Limited Hearing Baker Received Was Tainted By Prejudice and Possible Corruption.

28. Aside from the fact that the Alabama Supreme Court denied me any hearing at all on the four constitutional issues in the case, there are serious questions of fact and law as to whether the entire proceeding in the Alabama Supreme Court was so unfair as to constitute a violation of due process. The proceeding was grossly unfair in two separate respects.

29. In closing argument, the Bennetts' counsel urged the Alabama jury to 'stop lawyers in the biggest law firm in America," "New York lawyers," "from putting together abusive tax shelters," "costing the taxpayers 1.5 billion dollars a year." Despite the persistent misconduct of the Bennetts' counsel -- even after the judge warned him that she would declare a mistrial if he continued to employ improper tactics -- my motions for a mistrial were denied.

30. On appeal the Alabama Supreme Court held that I was not prejudiced by these pejorative references to me because the Bennetts' counsel used prejudicial arguments "primarily" in support of the punitive damages claim. Since the jury did not award punitive damages, the Court said, I was not prejudiced.

31. The accompanying memorandum of law shows that the United States Supreme court has not countenanced such appeals to regional prejudice.

32. Even more unfair, the records of the Alabama Secretary of State disclose that counsel for the Bennetts contributed at least $100,000 to the election campaigns of justices of the Alabama Supreme Court, including $50,000 for the just completed election.

33. Whether the Justices of the Alabama Supreme Court were influenced by these campaign contributions is an issue of fact which can not be resolved on a motion for summary judgment. (This, of course, will be in addition to any issues of fact that will be raised if the Bennetts deny the facts set forth above which show that there was no hearing on the issues as to which the Bennetts claim res judicata.

34. However, the appearance of impropriety is undeniable. As the accompanying memorandum of law shows, there is a denial of due process of law when judges may have a pecuniary reason to favor one of the litigants. It is not necessary to show that the judges were actually influenced.

_____
Leon C. Baker

Sworn to before me this
18th day of November 1992.

Debra Sauer
Notary Public

SUPREME COURT OF ALABAMA

SPECIAL TERM, 1992

1910384

Leon C. Baker

v.

J. R. Bennett and Laura Jean Bennett

Appeal from Madison Circuit Court
(CV-89-384)

STEAGALL, JUSTICE.

Leon Baker appeals from a judgment entered pursuant to a jury verdict for J. R. Bennett and his wife Laura Jean Bennett.

The Bennetts sued Baker, a tax attorney from New York; S. David Johnston, their personal accountant; and Johnston's accounting firm, alleging conspiracy to defraud, negligence, and malpractice. The Bennetts claimed that the defendants had fraudulently induced them to invest in an improper tax shelter and that the fraud resulted in their

payment of over $700,000 to the Internal Revenue Service ("IRS") in back taxes and interest.[1] Baker answered the Bennetts' complaint and asserted, among other things, that service of process was defective. Upon Baker's motion, the trial court quashed the purported service on Baker and gave the Bennetts 30 days to file an alias summons and complaint. The Bennetts complied; however, the record is silent as to whether service was ever completed. The Bennetts filed a second alias summons and complaint, which was properly served upon Baker. Baker filed a motion to dismiss, alleging that the trial court lacked personal jurisdiction over him; this motion was denied. Baker then petitioned this Court for a writ of mandamus to vacate the trial court's judgment on that motion, and this Court denied the writ. Baker subsequently filed a second answer to the Bennetts' complaint, and the Bennetts amended their complaint twice in response to the defenses raised.

Baker filed two motions for summary judgment, and both were denied. During the course of the subsequent jury trial, Baker moved for a directed verdict on all claims against him; his motion was granted as to the malpractice claim. The jury returned a general verdict against Baker for

[1]The Bennetts' claims against Johnston and Johnston's accounting firm were settled; neither of those defendants is a party to this appeal.

$440,025 in compensatory damages and no punitive damages. Baker moved for a judgment notwithstanding the verdict or, in the alternative, a new trial or a remittitur; that motion was denied by operation of law. Baker appeals.

The record reveals that the Bennetts owned a large interest in River Oaks Industries, a mobile home manufacturing business for which J. R. Bennett served as president and chief executive officer. Johnston was the Bennetts' personal accountant, as well as an advisor for many of the Bennetts' business interests. Baker was a business acquaintance of Johnston. J. R. Bennett had met Baker briefly in 1980 during a business meeting unrelated to this case.

In late 1980, the Bennetts were having difficulty paying the large income tax assessments on their successful mobile home manufacturing business. Because the Bennetts sought to continue expanding the business and needed to maximize their cash flow, Johnston suggested that they invest in computer leasing as a tax shelter. Six months earlier, two of Johnston's clients had entered into a computer leasing arrangement recommended to Johnston by Baker. The clients had purchased computers and peripheral equipment from Atlantic Computer Leasing (hereinafter "Atlantic") for $4,128,473. Atlantic, an English corporation, is a large

supplier of computer systems and specializes in arranged leases.

Baker had set up several of these transactions for Atlantic and had arranged the following plan involving two of Johnston's clients: IBM sold computers and equipment to two British entities, which entered into a leaseback arrangement with Atlantic. Atlantic then transferred the computers and equipment to Carena, Inc., its Dutch subsidiary, which resulted in tax advantages for the company due to certain provisions of Dutch tax law. Carena sold the equipment through a non-recourse mortgage to Coleman Leasing Corporation, an intermediary entity set up by Baker for this purpose. Baker was the sole stockholder in Coleman Leasing and was, in fact, its attorney. The two clients then purchased the computers and equipment from Coleman Leasing for $586,034. Their interest was subject to the non-recourse mortgage of $3,629,039 held by Carena on its initial purchase of the computers from IBM; however, the clients had no personal obligation to pay this mortgage. The clients paid a total of $100,000 in cash, with the remainder to be paid in escrow to Coleman Leasing according to a 10-year structured payment schedule. From these funds, Baker was required to disburse the monthly payment on the principal due to Carena as well as fees for Carena's broker

and his own legal fees. After executing the purchase agreement with Coleman Leasing, the clients immediately leased the computers back to Atlantic for a 10-year period. The amount of the clients' monthly purchase payment to Coleman Leasing was equal to the amount of Atlantic's monthly lease payment to them, so that no money actually changed hands each month. Under this arrangement, the clients could defer a certain amount of income tax for accelerated depreciation of the computers and for deduction of interest on indebtedness incurred for acquisition of the computers. At the end of the 10-year lease period, Atlantic would have the option to repurchase the computers and equipment for a nominal amount, then sell them to less-developed countries that have a need for older model computers. This residual value of the computers is Atlantic's primary source of profit in computer leasing transactions.

Baker represented Atlantic in the lease arrangement with the two clients and prepared the contracts and promissory note documents necessary to execute the relationship between Atlantic, Carena, Coleman Leasing, and the clients. The clients were required to make their monthly payments to Atlantic through Coleman Leasing.

Don Gibbs, one of the two clients, subsequently sold

his business and no longer needed the full amount of tax deferral generated by the computer leasing arrangement. Johnston then offered a one-half share of Gibbs's interest to the Bennetts, who were initially hesitant to invest in the rather complex transaction. Although he was unfamiliar with all the intricacies of the shelter, Johnston urged the Bennetts to invest and even lent them most of the "up front" money that was necessary for them to do so. Johnston told the Bennetts that they would have to report as income the rents received from Atlantic on the equipment, but that the depreciation of the equipment over the first five years would far exceed this income and would be reported as a loss. The Bennetts could then, he said, defer payment of taxes equal to that loss. Johnston also told the Bennetts that Baker would defend him before the IRS if there were ever any problems with the leasing arrangement. The Bennetts thereafter purchased a one-half share of Gibbs's interest in the computers for $1,315,938, with payments to be made to Gibbs each month.

The Bennetts took state and federal tax deferrals relating to the transactions in their returns for 1981 through 1983. During those years, River Oaks Industries was being audited. In early 1985, prior to the filing of the Bennetts' 1984 tax return, the IRS notified the Bennetts that their

personal tax returns would be audited. The Bennetts were represented at the audit by one of Johnston's associates in his accounting firm. At the end of the initial audit in 1985, the IRS informed the Bennetts that it was challenging the validity of the computer leasing, but that it would not go forward on the matter until a decision was rendered in Coleman v. Commissioner, 87 T.C. 178 (1986), affirmed, 833 F.2d 303 (3d Cir. 1987), a case pending before the United States Tax Court at that time. Coleman involved a similar computer leasing tax shelter that had been set up by Baker, using Coleman Leasing as the intermediary. Baker was defending the taxpayer in Coleman.

Johnston discussed the audit with the Bennetts and advised them to do nothing until Coleman was decided. Johnston expressed great confidence in Baker's ability to win the case and assured the Bennetts that there was nothing to worry about. Accordingly, the Bennetts included the deferrals from the computer leasing deal in their 1984 tax returns, which were then added to the audit. The Bennetts retained a different accounting firm to prepare their returns in 1985 and 1986. Upon the advice of Gary Joyce, a member of Johnston's accounting firm, the Bennetts' new accounting firm also included deferrals for the computer leasing in their tax returns for those years.

In a letter dated August 24, 1987, the IRS informed the Bennetts that the computer leasing deal was an "abusive" tax shelter. Specifically, the IRS determined that the computer equipment had been grossly overvalued, giving rise to inflated and fictitious losses. The IRS also questioned whether the computers and equipment ever actually existed, because the documentation relating to the computer leasing transaction did not contain serial numbers for the machinery. Based on these findings, the IRS assessed the Bennetts' back taxes, interest, and penalties totaling $1,200,000 for 1981 through 1984. The Bennetts immediately attempted to contact Baker in New York, but were unable to do so.

After retaining counsel, the Bennetts settled their state tax debt for $42,411.29 and their federal debt for $758,783.56. The IRS dropped its claim for penalties, because it determined that the Bennetts had relied on their advisors in investing in the computer leasing deal.

Baker raises several issues concerning the merits of the Bennetts' fraud claims against him; however, we first address his challenges to several procedural aspects of the case. Baker argues that the Bennetts' fraud claim is barred by the applicable statute of limitations as a matter of law and that the trial court erred in submitting the issue to the jury.

Under Ala. Code 1975, § 6-2-3, fraud actions are considered to have accrued upon the discovery by the aggrieved party of the facts constituting the fraud. Generally, the question of when a party discovered or should have discovered those facts so as to begin the running of the statutory period of limitations is one properly left to the jury. Hicks v. Globe Life & Accident Insurance Co., 584, So.2d 458 (Ala. 1991). The issue may be taken from the jury and decided as a matter of law only in cases where the plaintiff actually knew of facts that would put a reasonable mind on notice of fraud. Hicks, supra.

Based on the Hicks principle, Baker argues that the Bennetts' claim could have accrued at one of three different times: (1) when they received notice of the IRS audit in 1985, (2) when the IRS gave notice in 1986 that it intended to disallow the computer leasing venture as a tax shelter, or (3) when the Coleman decision, which involved similar facts and the same type of shelter, was issued in 1986.

The first letter from the IRS that the Bennetts received did not indicate that the computer transaction was suspect, nor was it an assessment for the deductions taken on the transaction. It was merely notice of the pending audit, and the Bennetts turned the matter over to Joyce. There is evidence that the Bennetts knew in 1985 that the

tax shelter might come under scrutiny; however, the record does not indicate that the Bennetts had grounds to suspect an underlying fraud at that point. Johnston and Joyce repeatedly assured them that the shelter would be upheld and continued to include the deferrals and deductions under the tax shelter in the Bennetts' 1984 and 1985 tax returns. The Bennetts thereafter retained new accountants to prepare their taxes and included the benefits of the tax shelter in their returns for those years.

The Bennetts had no contact with Baker during this period, but were "guaranteed" by Johnston that the Coleman case would be resolved favorably and thereby would eliminate any doubts the IRS might have about the legitimacy of the tax shelter. The Bennetts did not know the details and intricacies of Coleman, and there is no evidence to indicate that they should have. The Bennetts did not graduate from high school and have no experience in tax or legal matters. In view of this fact, it does not appear unreasonable that the Bennetts would rely on the expertise and assurances of their accountant during the audit.

The record shows that the Bennetts did not know until 1987 that Coleman Leasing was controlled by Baker, that the computers and equipment might not exist at all, and that the value of those goods might have been grossly

overvalued. It is those elements that formed the basis of the Bennetts' claims against Baker, not the mere knowledge that their returns were being audited or that the tax shelter could be disallowed. Upon their discovery of facts pertaining to Coleman Leasing and the valuation of the computers themselves, the Bennetts filed a timely complaint. In view of this, we conclude that the Bennetts did not have actual knowledge of the alleged fraud until 1987, within two years of the filing of the complaint. Whether they should have discovered the fraud earlier was an issue properly submitted for the jury's determination. Hicks, supra.

Baker next argues that the Bennetts' action should not be deemed to have been filed in October 1988, because he was not served with process until July 1990. An action is not "commenced for purposes of the statute of limitations if it is not filed with the bona fide intention of having it immediately served." Mace v. Centel Business Systems, 549 So.2d 70 (Ala. 1989). Generally, the claim may be barred where the plaintiff has manifested a lack of intent to serve the defendant promptly after filing. Thompson v. E. A. Industries, Inc., 540 So.2d 1362, citing Ward v. Saben Appliance Co., 391 So.2d 1030 (Ala. 1980) (statute of limitations not complied with where plaintiff requested a delay in service of process after filing complaint). See, also,

Pettibone Crane Co. v. Foster, 485 So.2d 712 (Ala. 1986) (failure to provide address of defendant was manifest evidence of intent not to promptly serve process).

The record shows that all other defendants in this case were served with process promptly after the filing of the complaint and that service was attempted on Baker. The service of process was sent by mistake to a law office located next to Baker's office in New York, and Baker testified at trial that a secretary in that office received it. Baker immediately acted upon this process by retaining counsel, who filed an answer and appeared at a deposition taken in 1989. He also filed a motion to quash service, which resulted in Baker's being properly served by a specially appointed process server. These facts certainly do not indicate any manifest lack of intent to promptly serve notice upon Baker; thus, we find no merit in this argument.

Baker next argues that the judgment against him is void because the trial court lacked in personam jurisdiction. In personam jurisdiction is proper if the defendant has such contacts with the state that maintenance of the suit does not offend traditional notions of substantial justice. Alabama Waterproofing Co. v. Hanby, 431 So.2d 141 (Ala. 1983). A party has sufficient contacts with the state of Alabama when that person, acting directly or by agent, is or may be

personally responsible as a consequence of that person's transacting business in this state. A.R.Civ.P. 4.2(a)(2)(A). The primary inquiry regarding personal jurisdiction is whether a defendant could have reasonably anticipated that the effects of his acts would be felt by the plaintiff in Alabama. Duke v. Young, 496 So.2d 37 (Ala. 1986).

The record shows that as an agent for Atlantic and as president of Coleman Leasing, Baker intentionally sent documents to this state to be executed by residents here, that he obtained promissory notes from Alabama residents that were payable at Alabama banks, that he mailed numerous items related to the computer lease transaction to this state, and that he accepted over $580,000 in cash payments from Alabama residents for Coleman Leasing. It is obvious that the repercussions of these acts would be felt by the Alabama residents involved; thus, we find no error in the trial court's conclusion that it had in personam jurisdiction over Baker.

We now turn to consider Baker's challenges to the merits of this case. He first contends that the trial court erred in denying his motion for a directed verdict on the Bennetts' claims of intentional fraud and suppression. At trial, the Bennetts emphasized that the monthly payments they made to Gibbs for his share in the tax shelter were

directed to Coleman Leasing. They claimed that Coleman Leasing was set up for Baker's own profit, with built-in kickbacks to Johnston. They further claimed that Baker and Johnston knowingly created a sham tax shelter and conspired to involve the Bennetts in the scheme in order to pump money into Coleman Leasing. They argued that both Johnston and Baker were guilty of suppressing material facts that would have led to the discovery of the purported fraud, and they accused Baker and Johnston of intentionally misleading them as to the facts underlying the leasing venture.

To prove suppression of a material fact, a plaintiff must establish (1) that the defendant had a duty to disclose that fact, (2) that the defendant concealed or failed to disclose that fact, (3) that the concealment or failure to disclose induced the plaintiff to act, and (4) that the action caused injury to the plaintiff, Ala. Code 1975, § 6-5-102. See, also, Gary v. Kirtland, 514 So.2d 970 (Ala. 1987). Section 6-5-102 does not require proof of an intent to deceive; rather, a breach of the defendant's duty to disclose the suppressed facts is sufficient to trigger liability. Burlington Northern R.V. v. Warren, 574 So.2d 758 (Ala. 1990). Under § 6-5-102, a duty to disclose arises either from a confidential relationship between the parties or from the

particular facts and circumstances of the case. The question of the existence of a duty to communicate under § 6-5-102 is for the jury, which should consider the relationship of the parties, the value of the particular facts suppressed, and the relative knowledge of each party. Lowder Realty, Inc. v. Odom, 495 So.2d 23 (Ala. 1986). Where the defendant had superior knowledge of the suppressed fact and the defrauded party has been induced to take action that otherwise might not have been taken, the obligation to disclose is particularly compelling. Dominick v. Dixie Nat'l Life Ins. Co., 809 F.2d 1559 (11th Cir. 1987).

In this case, there is no substantial evidence of a confidential relationship between Baker and the Bennetts that would give rise to a duty to disclose the facts underlying the computer leasing venture. However, the record shows that the Bennetts talked to Baker briefly by telephone in 1985, when they were in Johnston's office deliberating over whether to buy into the computer leasing venture. In that conversation, Baker stated that computer leasing was a "good tax shelter," but he did not reveal any of the underlying facts of the operation. It is undisputed that Baker had superior knowledge of the actual value of the computers and of the role of Coleman Leasing in the arrangement and also knew that these factors could be

critical if the IRS questioned the tax shelter. It is likewise undisputed that the Bennetts relied on Baker and Johnston's expertise in entering into the venture.

In view of these facts, we cannot say that the trial court erred in submitting the issue of suppression to the jury. A directed verdict is proper only where there is a complete absence of proof on a material issue or where there are no disputed questions of fact on which reasonable people could differ. National Security Fire & Casualty Co. v. Vintson, 454 So.2d 942 (Ala. 1984). Here, there was evidence relating to the elements of fraud under § 6-5-102, and much of it was highly controverted; thus, Baker's motion for a directed verdict was properly denied.

Likewise, we hold that the trial court did not err in failing to direct a verdict against the Bennetts' claim of fraudulent misrepresentation under § 6-5-101. Before a claim under this section may be submitted to the jury, the plaintiff must establish four elements of fraud: (1) a false representation (2) concerning a material existing fact (3) relied upon by the plaintiff (4) who was damaged as a proximate result. Cherokee Farms, Inc. v. Fireman's Fund Ins. Co., 526 So.2d 871 (Ala. 1988). A false representation, even if made by mistake or innocently, is a legal fraud and this section applies, entitling a plaintiff to compensatory

damages. Morgan v. South Central Bell Tel. Co., 466 So.2d 107 (Ala. 1985). Where the evidence reasonably affords an inference that the plaintiff was defrauded by the misrepresentation, the case is one for the trier of fact. Hartselle Real Estate & Ins. Co. v. Atkins, 426 So.2d 451 (Ala.Civ.App. 1983).

Baker argues that the representation he made to the Bennetts, i.e., that computer leasing was a good tax shelter, was not false at the time he gave it in 1981. At that point, the Coleman case had not been decided and the shelter had not been disallowed. Baker also correctly points out that the mere statement of an opinion is usually not a representation of material fact upon which an action for legal fraud can be based, particularly when there is no evidence of an intent to deceive. Reynolds v. Mitchell, 529 So.2d 227 (Ala. 1988). However, the Bennetts did not base their claim of misrepresentation solely on Baker's opinion of the tax shelter. The Bennetts also alleged that Baker first misrepresented the amount of money that would be directed through Coleman Leasing and then misrepresented the actual and residual value of the computers involved in the transaction. The record shows that the Bennetts' scheduled payments to Gibbs were channeled through Coleman Leasing for disbursal to Carena and the underlying parties

in the transaction. Baker sharply disputed the impropriety of any of these disbursals, but was unable to produce a complete record of the money he allocated as the attorney in fact and sole shareholder of Coleman Leasing. Moreover, an expert witness for the Bennetts testified that the value of the computers was considerably less than Baker reported it to be. While this testimony was rebutted with detailed evidence from Baker concerning the true value of the equipment, it was sufficient to create an inference of fraudulent misrepresentation.

Baker next argues that the trial court erred in failing to give certain jury instructions regarding the issues of suppression and material misrepresentation. The record shows that during the trial, the Bennetts' counsel sought to establish that Baker "pocketed" the funds paid into Coleman Leasing and that the underlying transaction was a sham. During closing argument, the Bennetts' counsel asked the jury to "Stop lawyers in the biggest law firm in America" and "New York lawyers" from putting together abusive tax shelters. Baker's counsel objected to these comments when they were made, and the trial court sustained the objections and gave curative instructions.

In a fraud case, counsel is given broad leeway in arguing the merits and is allowed in closing argument to

comment on all proper inferences from the evidence based on his own reasoning. Seaboard Coastline R.R. v. Moore, 479 So.2d 1131 (Ala. 1985). When an objection to an improper comment during argument is sustained and the trial court instructs the jury to disregard the remark, the test on appeal is whether the comment was so prejudicial that its effect was not or could not be eradicated from the minds of the jurors. Harrison v. Woodley Square Apartments, 421 So.2d 101 (Ala. 1982).

In this case, Baker insists that the statements made by the Bennetts' counsel inflamed the jury and resulted in an unreasonably high verdict. However, the statements in question were made primarily in counsel's attempt to win an award of punitive damages for the Bennetts. The fact that the jury declined to award even a small amount of punitive damages indicates that the statements made by the Bennetts' counsel did not unduly prejudice their minds against Baker. We therefore find the statements not so inflammatory as to warrant a new trial.

Baker next argues that the jury's award of $440,025 in compensatory damages was unsupported by the evidence and is, thus, due to be overturned. He contends that this amount was computed based on the amount of taxes the Bennetts were required to pay to the IRS. Baker points out

that the tax benefit to be gained from the computer transaction was a deferral, not a deduction, and that the Bennetts would have had to pay taxes to the IRS in any event. However, the amount of taxes paid to the IRS by the Bennetts is not the only element the jury could have considered in making its award. As previously discussed, there was evidence that the Bennetts paid an inflated amount for computer equipment that was grossly undervalued and then lost the residual value of the equipment. At trial, counsel for the Bennetts vigorously argued that this evidence should be a primary element in the jury's award of damages.

In reviewing a jury verdict, this Court must determine whether the evidence, viewed in the light most favorable to the plaintiff, was so preponderantly against the verdict as to be plainly and palpably wrong and unjust. Christiansen v. Hall, 567 So.2d 1338 (Ala. 1990). After examining the evidence contained in the record, we cannot say that it is so entirely against the verdict as to constitute plain error; therefore, in accordance with our narrow standard of review, we must affirm the jury's determination of this issue.

The judgment entered by the trial court pursuant to the jury verdict is due to be affirmed.

AFFIRMED.

Hornsby, C. J., and Maddox, Shores, Adams, Houston, Kennedy, and Ingram, JJ., concur.

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA
September 4, 1992

1910384

Leon C. Baker v. J. R. Bennett and Laura Jean Bennett

County: Madison Circuit Court No.: CV-89-384J

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

STEAGALL, J. - Hornsby, CJ., Maddox, Shores, Adams, Houston, Kennedy and Ingram, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 4th day of September, 1992.

S/Robert G. Esdale
Clerk, Supreme Court of Alabama

55.501 Florida Enforcement of Foreign Judgments Act; short title. — Sections 55.501-55-509 may be cited as the "Florida Enforcement of Foreign Judgments Act."

55.502 Construction of act. —

(1) As used in ss. 55.501-55.509, the term "foreign judgment" means any judgment, decree, or order of a court of any other state if such judgment, decree, or order is entitled to full faith and credit in this state.

(2) This act shall not be construed to impair the right of a judgment creditor to bring an action to enforce his judgment instead of proceeding under this act.

(3) This act shall be interpreted and construed to effectuate its general purpose to make uniform the law with respect to the subject of this act among states enacting it.

(4) Nothing contained in this act shall be construed to alter, modify, or extend the limitation period applicable for the enforcement of foreign judgments.

55.503 Recording and status of foreign judgments, fees. —

(1) A copy of any foreign judgment certified in accordance with the laws of the United States or of this state may be recorded in the office of the clerk of the circuit court of any county. The clerk shall file, record, and index the

foreign judgment in the same manner as a judgment of a circuit or county court of this state. A judgment so recorded shall have the same effect and shall be subject to the same rules of civil procedure, legal and equitable defenses, and proceedings for reopening, vacating or staying judgments, and it may be enforced, released, or satisfied, as a judgment of a circuit or county court of this state.

(2) Any person recording a foreign judgment shall pay to the clerk of the circuit court a service charge as is required for the recording of an original action demanding the relief or judgment granted in the foreign judgment.

55.505 Notice of recording; prerequisite to enforcement.

(1) At the time of the recording of a foreign judgment, the judgment creditor shall make and record the clerk of the circuit court an affidavit setting forth the name and last known post-office address of the judgment debtor and of the judgment creditor.

(2) Promptly upon the recording of the foreign judgment and the affidavit, the clerk shall mail notice of the recording of the foreign judgment, by registered mail with return receipt requested, to the judgment debtor at the address given in the affidavit and shall make a note of the mailing in the docket. The notice shall include the name and

post-office address of the judgment creditor and of the judgment creditor's attorney, if any, in this state. In addition, the judgment creditor may mail a notice of the recording of the judgment to the judgment debtor and may record proof of mailing with the clerk. The failure of the clerk to mail notice of recording will not affect the enforcement proceedings if proof of mailing by the judgment creditor has been recorded.

(3) No execution or other process for enforcement of a foreign judgment recorded hereunder shall issue until 30 days after the mailing of notice by the clerk. When an action authorized in s. 55.509(1) is filed, it acts as an automatic stay of the effect of this section.

55.507 Lien; when effective — A foreign judgment does not operate as a lien until 30 days after the mailing of notice by the clerk. When an action authorized in s. 55.509(1) is filed, it acts as an automatic stay of the effect of this section.

55.509 Stay of enforcement of foreign judgment —

(1) If, within 30 days, after the date the foreign judgment is recorded, the judgment debtor files an action contesting the jurisdiction of the court which entered the foreign judgment or the validity of the foreign judgment and

records a lis pendens directed toward the foreign judgment, the court shall stay enforcement of the foreign judgment and the judgment lien upon the filing of the action by the judgment debtor.

(2) If the judgment debtor shows the circuit or county court any ground upon which enforcement of a judgment of any circuit or county court of this state would be stayed, the court shall stay enforcement of the foreign judgment for an appropriate period, upon requiring the same security for satisfaction of the judgment which is required in this state.